United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7321

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GENESEE VALLEY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN and EULA LEE BLOWERS,

Plaintiffs-Appellants

B

-v-

ELISHA C. FREEDMAN, Individually and as City Manager of the City of Rochester; THOMAS P. RYAN, JR., Individually and as Mayor of the City of Rochester; THOMAS GOSNELL, Individually and as President of Lawyers Cooperative Publishing Company; LAWYERS COOPERATIVE PUBLISHING COMPANY, INC.,

P/S

Defendants-Appellees.

ON APPEAL FROM THE DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF NEW YORK

Civil Action No. 74-522

BRIEF FOR DEFENDANTS-APPELLEES

Respectfully submitted,

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the court below correctly dismissed the complaint for failure to state a claim upon which relief could be granted.

2. Whether the court below properly denied plaintiffs' request for a preliminary injunction.

STATEMENT OF THE CASE

Plaintiffs appeal from an order of the Honorable Harold P. Burke, Judge of the United States District Court, Western District of New York dismissing the complaint herein for failure to state facts upon which to base a federal claim (A 262-267). The action arose as the result of a written agreement signed by Elisha Freedman as City Manager of the City of Rochester (City) and Thomas Gosnell as President of Lawyer's Cooperative Publishing Company. Under the terms of the agreement (A 31-36), dated April 30, 1974, the City agreed to transfer custody, possession and control, but not ownership, of a City-owned statue of the god Mercury which had been in storage since 1951, to Lawyer's Cooperative. In turn, Lawyer's Cooperative agreed to refurbish the statue and construct a pedestal for the statue's display atop its building in downtown Rochester. The cost of transporting, refurbishing and erecting the statue was borne by Lawyer's Cooperative.

Upon completion of the display pedestal, a public ceremony was scheduled for November 15, 1974 to celebrate placement of the statue. On November 7, 1974, plaintiffs filed this action for injunctive relief, declaratory judgment and money damages (A 3-75). Plaintiffs' brief at 10-11 fairly summarizes the allegations of the complaint. Defendants were ordered to show cause November 11, 1974, why a preliminary injunction barring

placement of the Mercury statue as scheduled for November 15, 1974, should not be granted (A 75-81).

Following oral argument and submission of written responses, the motion for preliminary injunction was denied (A 145-149). On November 26, 1974, defendants Gosnell and Lawyers Cooperative moved for dismissal of the complaint and/or summary judgment on the grounds of lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted (A 160-168). Defendants Freedman and Ryan moved for the same relief by Order to Show Cause dated December 16, 1974 (A 172-178). Both defendants also moved to stay discovery proceedings instituted by plaintiffs.

Following oral argument on the motions, the order dismissing the complaint as to all defendants was signed April 24, 1975. Plaintiffs filed a Notice of Appeal on May 22, 1975 (A 267).

POINT I.

THE COURT BELOW CORRECTLY DISMISSED PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

A. The agreement between the defendants is not unconstitutional.

The thrust of plaintiffs' argument against defendants Freedman and Ryan appears to be that an agreement to allow the placing of a City of Rochester-owned statue of the god Mercury atop a building owned by Lawyers Cooperative Publishing Company, an alleged employment discriminator, somehow constitutes aid, support and promotion of that discrimination by the City, and therefore violates the rights of plaintiffs. Plaintiffs cite the 14th Amendment to the U.S. Constitution, 42 U.S.C. 1983 and 1985 in defining those rights and as prohibition against the conduct of defendants Freedman and Ryan.

Defendants do not now, nor have they ever questioned the rights of Plaintiffs to the equal protection of the laws. But it is clear that, even construing all of the allegations of plaintiff' complaint in a light most favorable to plaintiffs, nothing therein points to any violation of the rights of plaintiffs by the defendants.

Taking the basic allegations separately, plaintiffs claim all the defendants conspired to deprive plaintiffs of their constitutional rights, and as a result, plaintiffs have a right of action against defendants under 42 U.S.C. 1985. The complaint alleges that defendants Freedman and Ryan conspired with defendants Gosnell and Lawyers Cooperative Publishing Company to deprive plaintiffs of equal employment opportunities at Lawyers Cooperative, and accomplished this by placing a City-owned statue of the god Mercury atop a building owned by Lawyers Cooperative in downtown Rochester. The theory of conspiracy is grounded upon two assumptions: 1.) That Lawyers Cooperative discriminates against females in its employment practices and 2.) that the placement of the City-owned Mercury statue atop the Lawyers Cooperative building aides and promotes that discrimination. Plaintiffs outline in great detail the manner in which Lawyers Cooperative allegedly discriminates against women in its employment practices, but fail to show in any manner what effect the agreement between the City and Lawyers Cooperative has on those practices. No allegations are made in support of the conclusion that the placement of the statue aids and promotes discrimination, and even plaintiffs' brief fails to set forth a set of facts consistent with that conclusion.

Further, plaintiffs purport to show an intent for the alleged conspiracy by reversing the order of assumptions put forth above, i.e., the parties agreed to display Mercury atop a Lawyers Cooperative building; Lawyers Cooperative discriminates; therefore, the intent of the parties was to aid and promote the continuation of that discrimination. Such faulty logic is hardly a valid substitute for a legally sufficient allegation of conspiracy. At the very least, plaintiff is required to allege that the purpose of the conspiracy was to deprive plaintiff of equal protection, privileges and immunities, that defendants intended to discriminate against plaintiffs and that the acts done in furtherance of the conspiracy resulted in an injury to plaintiffs' person or property or prevented them from exercising a right or privilege of a United States citizen. Sykes v. State of California (Department of Motor Vehicles), 497 F 2d. 197 (9th Cir., 1974).

The complaint and plaintiffs' brief contain many statements to the effect that the statue involved has been owned by the City of Rochester for many years and the City had long sought an appropriate way to restore the statue to the Rochester skyline. The statue was certainly not fabricated for purposes of displaying it atop the Lawyers Cooperative building, nor does the statue itself show a literal or symbolic degradation of woman or inherent

approval of any discriminatory practices. The facts as stated by plaintiffs contradict any intent on the part of City officials to do any more than return the statue to public display.

The signing of the agreement by defendants Freedman and Gosnell is the only act alleged to have been performed in furtherance of the alleged conspiracy. But an examination of the agreement shows it to be devoid of any reference to any internal operations of Lawyers Cooperative, or any expenditure of funds by the City of Rochester. Certainly the agreement itself cannot be used as evidence of anything other than what appears on its face. As the Supreme Court stated in Griffen v. Breckenridge, 91 S. Ct. 1790, 403 U.S. 88, 29 L.Ed. 2d 338 (1971): "The language requiring intent to deprive of equal protection or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." There is no possible way the actions of the defendants can be construed to evidence an invidiously discriminatory animus toward anyone.

Plaintiffs place particular emphasis on Norwood v. Harrison, 413 U.S. 455, 93 St. Ct. 2804, 37 L.Ed. 2d 723 (1973) to support two propositions: 1.) That no governmental entity may use its power of "appropriation, purse, taxation, contract, lease, or its prestige to foster or promote, directly or indirectly, discrimination" and 2.) that "no precise causal relationship between the aid of government and the continued existence of the private entity need be shown." But Norwood involved a state (Mississippi) program of textbook loans to private schools which discriminated against black pupils. The court held that such aid by the state was improper. "A State may not grant the type of tangible,financial aid here involved if that aid has a significant tendency to facilitate, reinforce and support private discrimination." (emphasis added). The court made two very important points: 1.) The textbook program was tangible, financial aid and 2.) such aid is improper only where it has a significant tendency to facilitate, reinforce and support discrimination. Certainly it is not impossible for a school to operate without textbook loans of the type found in Norwood, but such aid must, of necessity, facilitate its continued operation, and thus involve the state to some degree in its support. In the instant case, however, no tangible financial aid has passed from the City to Lawyers Cooperative

nor are the operations of Lawyers Cooperative (i.e., the publication of law books) facilitated in any way by the placement of the statue. Even if the City expended public funds (which it did not), to refurbish and erect the statue, this certainly cannot be construed as funding in aid of Lawyers Cooperative business operations. The statue cannot be used to publish or sell law books.

Plaintiffs allege that Lawyers Cooperative has maintained discriminatory employment practices for a period of time prior to the signing of the agreement at issue here. But there are no allegations showing how the statue has had even a single effect on those practices. Plaintiffs' brief states that the agreement perpetuates employment discrimination at Lawyers Cooperative and postpoines enforcement of laws designed to eliminate discrimination. The unanswered question: In what way? The lawsuits already instituted by plaintiffs against Lawyers Cooperative will run their course and a judicial determination of the issues therein will be made. Nothing the City of Rochester has done or can do will hasten or retard the timing of that determination.

It is significant that plaintiffs cite Byrd v. Local Union No. 24 International Brotherhood of Electrical Workers, 375 F. Supp. 545 (D.C. Md., 1974) as being analogous to the instant case. The case is analogous, but not for the reasons stated by plaintiffs. The case involved a suit against a union, subcontractors and a general contractor, among others, alleging, inter alia, a conspiracy to prevent blacks from gaining access to equal employment. The allegation against the general contractor was that it was aware of the discriminatory practices of the union and subcontractors and yet continued to employ them on various contracts, thus ratifying and encouraging the illegal practice. The court dismissed the conspiracy claim against the general contractor, saying:

> "In order for [Defendant] to be a member of a conspiracy, it must have agreed, expressly or impliedly, with one or more other entities to inflict a wrong or injury upon another. There must have been a single plan, the essential nature and general scope of which was known to [Defendant] as the object and purpose of the conspiracy.... The mere knowledge, however, that the subcontractors discriminated against the plaintiffs does not make [Defendant] a member of the conspiracy by continuing to employ the subcontractor...." Byrd v. Local Union No. 24, supra at 558.

B. The Agreement Between the Defendants Is Legal.

Plaintiffs argue that defendants Freedman and Ryan violated federal law in signing the agreement with Lawyers Cooperative under the theory that federal law forbids the City from doing business with any entity which engages in illegal employment practices.

Plaintiffs' brief blithely cites Title VII of the Civil Rights Act of 1964 as applicable to the issue, and disputes the holding below to the contrary. But, plaintiffs cite nothing to demonstrate the relevance of Title VII to the case at bar, and a careful reading of the statute shows it has absolutely no relationship to the agreement between the City and Lawyers Cooperative. The affirmative action plan adopted by the City of Rochester, pointed out in plaintiffs' brief, is evidence of the City's approach to equal employment opportunity. And the contract compliance provisions of that plan is further evidence of the City's good faith. But to assert that the City violates the contract compliance provisions of its affirmative action program in signing the agreement with Lawyers Cooperative is grossly misleading. The purpose behind contract compliance is to insure that money expended by

governmental entities for goods and services supplied by outside contractors is not used to support those who engage in discriminatory employment practices. In this instance, however, Lawyers Cooperative offered its own funds to refurbish and display a City-owned statue. The City did not solicit this action, nor did it expend any funds to have it carried out. Clearly, the agreement does not fall under the terms of the affirmative action program. And even if the City did expend its own funds, such expenditures would only have been to refurbish and display the statue. This money would not have gone to Lawyers Cooperative in any event, since Lawyers Cooperative is obviously not in the business of refurbishing and displaying statues. This same argument is applicable in response to plaintiffs' citations of the Revenue Sharing Act (State and Local Fiscal Assistance Act of 1972) and the Omnibus Crime Control and Safe Streets Act of 1968. Any funds received and expended by the City under those acts would not have gone to Lawyers Cooperative.

It is clear that plaintiffs have failed to show grounds for federal jurisdiction over this matter, and thus no grounds for jurisdiction over claims under State law exist. See United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966).

But, assuming, arguendo, pendant jurisdiction, plaintiffs' claims under State law are misplaced.

New York State Labor Law, Section 220-e, cited by plaintiffs, is applicable by its terms only to contracts entered into by a municipality either for (1) the construction, alteration or repair of public buildings or other public works, or (2) the manufacture, sale or distribution of materials, equipment or supplies. Section 220-e requires only that such contracts contain a provision that the contractor will not discriminate in the hiring of employees for the performance of the work contemplated by the particular contract. The statute is irrelevant to the case at bar in that it is aimed only at discrimination in the employment of those hired to actually perform work required under the contract, in this case the refurbishing and erection of the Mercury statue. There is no allegation that Lawyers Cooperative employees did this work. Thus, the statue has nothing to do with plaintiffs' allegations of company-wide discrimination within the Lawyers Cooperative Publishing Company.

The plaintiffs contend that the execution of the agreement herein was not done in compliance with Chapter 8A of the Rochester Municipal Code, entitled "Purchasing and Property Management", and cite several sections therefrom in support of their contention.

It is important to note immediately that this entire chapter of the Municipal Code deals only with "agreements and orders for the procurement or sale of supplies or services". (See §8A-2, Definitions, CONTRACTS). Clearly, an agreement to display the Mercury statue is not an agreement to procure or sell supplies or services. The statue is neither a supply nor a service. The words "procurement or sale" obviously imply a transaction involving the expenditure of public funds. Indeed, the whole purpose of Chapter 8A is to provide safeguards for the expenditure of public funds in purchasing transactions. No public funds are involved in the agreement to display the Mercury statue. The City annually enters into scores of contracts which are <u>not</u> governed by the provisions of Chapter 8A, and this is one of them. Again, when defining the term "CONTRACTUAL SERVICES", Section 8A-2 states, "the term shall not include...services which are in their nature unique and not subject to competition." An agreement to refurbish and

display the Mercury statue at private expense is nothing if not unique. This exclusion is repeated frequently throughout the various sections of Chapter 8A.

Of all the sections cited by the plaintiffs, only one could have any remote connection with this situation, Section 8A-17 "Disposal of Surplus Property". Assuming that the Mercury statue is "surplus property", the section requires that the transaction be evidenced in writing, and that the transaction be authorized by the City Manager if the value of the property is more than $1,000.00. The purchasing agent may execute documents but is not required to do so. Competitive bidding is not required if the property is donated,provided the City Manager approves the donation. Here, the agreement is in writing, competitive bidding is neither required nor feasible because this unique property is in effect being donated, and the City Manager has signed the agreement thereby indicating his approval. Thus, even if Section 8A-17 is applicable to this situation, all the requirements of the section have been met. The agreement was legally executed and is valid.

Plaintiffs also cite Section 6-19 of the Rochester City Charter (erroneously cited by plaintiffs as Rochester Municipal Code) dealing with approval of contracts. The plaintiffs contend that this section requires the approval of the Comptroller (recently changed to Director of Finance) on this agreement. A simple reading of the section clearly indicates that it is restricted to contracts which obligate the expenditure of public funds. The section expressly states "no such obligation shall be approved in an amount in excess of money appropriated or otherwise lawfully available". Obviously, the whole purpose of the section is to require approval of the Director of Finance when money is involved. There is no need for review and approval of an agreement that does not involve any public funds. The plaintiffs neglect to point out that the City officer charged with the duty of approving this agreement was the Corporation Counsel, who did approve it and whose signature appears on the last page of the agreement.

POINT II.

THE COURT BELOW PROPERLY DENIED PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

An application for preliminary injunctive relief requires a showing of substantial likelihood of success on the merits, irreparable harm if the relief is denied and absence of substantial harm to the opposing party. League of Voluntary Hospitals and Homes of New York v. Local 1199, Drug & Hospital Union, 490 F. 2d 1398 (2nd Cir. 1973) A.L.K. Corp. v. Columbia Pictures Industries, Inc., 440 F. 2d 761 (3rd Cir., 1971).

As has already been pointed out, plaintiffs' legal position is tenuous at best. There simply are no case holdings or statutes prohibiting the agreement between the City and Lawyers Cooperative, and the strained interpretations in plaintiffs' brief evidence this. The holding of the court below is a further demonstration that plaintiffs' success is unlikely.

The contention that placement of the statue atop the Lawyers Cooperative building aligns the City of Rochester with the internal policies of Lawyers Cooperative, thereby harming plaintiffs, defies logic. Plaintiffs apparently believe that the courts now hearing plaintiffs' several suits

against Lawyers Cooperative for alleged employment discrimination will be so impressed by the fact that the City-owned statue rests atop a Lawyers Cooperative building that they cannot possibly try the matters fairly. Plaintiffs are unable to point to a single positive change in their circumstances vis a vis discrimination by Lawyers Cooperative wrought by the placement of the statue. That fact alone is enough to show lack of irreparable harm.

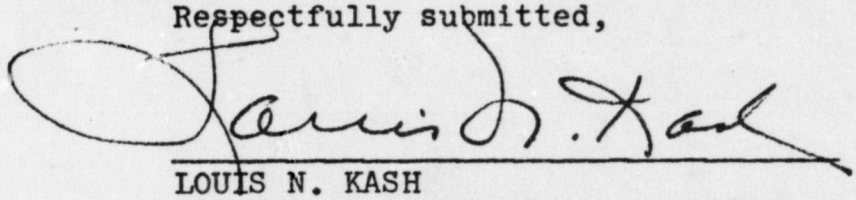
Plaintiffs' argument that denial of a preliminary injunction was improper because of factual disputes between the parties is incorrect. A reading of the Supplemental Affidavit of Sheila Molnar and Eula Lee Blowers, in support of the motion for preliminary injunction (A 128-136), submitted in response to the answering affidavits of defendants, shows only a dispute as to the legality of the agreement between the defendants, and the legal sufficiency of the facts contained in defendants' affidavits. No contradictory facts are supplied in the supplemental affidavit.

Thus, the denial of the preliminary injunction was mandated under the law.

CONCLUSION

For the foregoing reasons, defendants Freedman and Ryan respectfully request that this court affirm the lower court's dismissal of the complaint, its granting of summary judgment, and denial of a preliminary injunction.

Respectfully submitted,



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DATED: October 6, 1975

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief of defendants-appellees Freedman and Ryan was served on plaintiffs-appellants by my causing two copies thereof to be mailed to Emmelyn Logan-Baldwin, Attorney for plaintiffs-appellants, 510 Powers Building, Rochester, New York, 14614 this ___ day of October, 1975.

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